SARLIM TIMBER PROCESSING FACTORY SDN BHD A

v.

SASACOM SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING B
CLEMENT SKINNER J
[SUIT NO: 22-121-2003-I]
18 AUGUST 2006

CIVIL PROCEDURE: *Interim payment - Pending trial of breach of sub-lease agreement - Whether requirements satisfied for Court to order interim payment under O. 22A r. 4(b) - Whether plaintiff's action included a claim for possession of land - Whether defendant liable to pay to plaintiff a sum of money in respect of defendant's use and occupation of land during pendency of action - Whether plaintiff experienced any hardship - Whether plaintiff deserved to have its hardship alleviated during pendency of case - Whether court can make such adjustments with respect to interim payment as may be just - Rules of the High Court 1980, O. 18 r. 19, O. 22A* C D

The plaintiff was the registered proprietor of a piece of land ('the said land') which was subleased to the defendant at a monthly rent of RM23,000. Under the sublease, the defendant was granted an option to purchase the said land whereby if the defendant exercised its option to purchase, then the monthly rental payable would become 50% of RM23,000 *ie*, RM11,500 per month. Subsequently, the defendant defaulted in payment of rentals. The plaintiff terminated the sublease and demanded vacant possession of the said land. The plaintiff then commenced an action at the Sessions Court Kuching praying for vacant possession of the said land, outstanding monthly rentals and mesne profits. The defendant challenged the termination of the sublease and contended that it had validly exercised the option to purchase the said land. The defendant prayed for specific performance of the option to purchase in its counter-claim. Since the defendant remained in occupation of the said land but was not paying any rentals for its use and occupation, the plaintiff filed this application under O. 22A Rules of the High Court 1980 for an order that the defendant do make interim payment to it of the sum of RM23,000 per month. The learned deputy registrar granted the application but only ordered payment of RM11,500 per month on the grounds that if the court were to eventually find that the defendant had validly exercised the option to purchase the said land, then the plaintiff would only be entitled to be paid monthly rental at RM11,500 per month. The defendant being unhappy with the deputy registrar's decision, brought this appeal. The defendant contended that E F G H I

A the affidavit filed by the plaintiff in support of its application was defective. The defendant further claimed that the plaintiff had failed, on a balance of probabilities, to satisfy the requirements set out in O. 22A r. 4(b).

B **Held (dismissing the defendant's appeal with costs):**

(1) As far as the matters that need to be deposed to in the plaintiff's affidavit were concerned, the plaintiff had complied with the requirements of O. 22A. (para 16)

C **(2)** Under of O. 22A r. 4(b), before the court exercises its discretion to order interim payment under the sub-rule, it must be satisfied: (i) that the plaintiff's action includes a claim for possession of land, which it did in this instance; (ii) that if the action proceeds to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land
D during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant. This requirement had been satisfied by the plaintiff; and (iii) that if the court is satisfied with the matters referred to in (i) and (ii) above, then the court may, if it thinks fit, order the defendant to make an interim
E payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counter-claim on which the defendant may be entitled to rely. It was obvious that if the defendant was eventually successful in its counter-claim, it would only be liable to pay rentals at RM11,50 per month to the plaintiff. (para 17)

F **(3)** Order 22A r. 9 empowers the court to make such adjustments with respect to the interim payment as may be just at the conclusion of the trial. There was nothing to prevent the defendant from requesting the court to direct, at the end of the trial, that the whole
G of the interim payment be used to offset the purchase price of the said land. (para 19)

(4) The plaintiff experienced hardship from the commencement of the action until the conclusion of the trial. The defendant continued to use and occupy the said land but refused to pay any rental. The
H plaintiff deserved to have its hardship alleviated during the pendency of the case. The plaintiff had also satisfied all the requirements of O. 22A rr. 2 and 4 and had made out a case for interim relief. (para 20)

I

Case(s) referred to: A
David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Anor [2005] 1 CLJ 589 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(a), (b), (c), (d), O. 22A rr. 2, 4(b), 9 B

Other source(s) referred to:
Malaysian High Court Practice 1998 Desk Edition, vol 1, p 1002

For the plaintiff - Colin Lai; M/s Lai & Co
For the defendant - William Kong; M/s William Kong & Co C

Reported by Amutha Suppayah

JUDGMENT

Clement Skinner J: D

[1] On application made to him by the plaintiff under O. 22A r. 2 and 4(b) Rules of the High Court ('the RHC'), the learned deputy registrar did, on 7 September 2005 make an order that the defendant herein do make the interim payments which I will describe shortly ('the order for interim payment'), to the plaintiff pending the hearing of this E suit. The essential facts leading to the making of the order for interim payment are these.

[2] The plaintiff is the registered proprietor of a piece of land ('the said land') which it subleased to the defendant for an initial period of five years from 6 October 1993 and subsequently for another period of F five years from 1 April 1998 to 31 March 2003, at a monthly rent of RM23,000. Amongst the terms and conditions contained in the second sublease, one term deserves mention, namely, that the defendant was granted an option to purchase the said land. Under the terms of the option granted, if the defendant exercised its option to purchase, then G the monthly rental payable would be 50% of RM23,000 ie, RM11,500 per month from the date of the exercise of the option to the actual date of signing of the memorandum of transfer.

[3] The said land was vacant land when let to the defendant, but the H defendant has constructed buildings and facilities on the said land, from which I am given to understand it conducts ship building and repair activities.

[4] The plaintiff alleges that by 2002 the defendant was in breach of the sublease, in that, it had failed to pay the rentals due under the I sublease for the months of July 2001 through to July 2002 amounting to some RM299,000. Accordingly, by a letter dated 25 July 2002 the

plaintiff terminated the sublease and demanded vacant possession of the said land. The defendant paid up the arrears of rent but failed to pay any rentals from August 2002 onwards and neither did the defendant deliver vacant possession of the said land back to the plaintiff but has continued to remain in occupation and use of the said land. On 11 February 2003 the plaintiff commenced this action at the Sessions Court Kuching praying for, *inter alia*:

(i) vacant possession of the said land;

(ii) payment of outstanding monthly rentals due up to February 2002 amounting to RM161,000 or alternatively mesne profits at the rate of RM46,000 per month from 1 August 2002 till the date of the service of the summons;

(iii) mesne profits at the rate of RM46,000 per month from date of service of summons until vacant possession of the said land is delivered up.

[5] The defendant has filed a defence and counter-claim in this suit. Essentially the defendant challenges the termination of the sublease in its defence and contends that it had validly exercised the option to purchase the said land and has, by way of counter-claim, prayed for specific performance of the option to purchase. Alternatively, the defendant claims damages for breach of the option.

[6] In view of the matters which a court must take into account when hearing an application for interim payment under O. 22A RHC, it will be convenient at this stage to state briefly the terms of the option to purchase. Under the terms by which the option was granted, the parties had agreed that if the option was exercised then within 1 month thereof, the parties would agree on a purchase price failing which the parties would jointly instruct Messrs C.H. Williams Talhar Wong & Yeo Sdn Bhd to value the said land and accept such valuation as the purchase price, whereupon the parties would forthwith execute a sale and purchase agreement, a draft of which was annexed to the option. The parties further agreed that (a) the costs of the valuation report would be shared equally by each of them; (b) 20% of the total of the monthly rents paid under the second sublease up to the transfer shall be treated as part payment of the purchase price; (c) the defendant shall continue to pay fifty per cent (50%) of the monthly rental during the period between the exercise of the option to purchase and the actual date of signing of the transfer.

[7] As I said a moment ago, in the main suit, it is the defendant's case that it had exercised the option to purchase on 3 October 2001, but this is disputed by the plaintiff. The defendant also contends that

with the plaintiff's consent and knowledge the defendant obtained a valuation of the said land from Messrs C.H. Williams Talhar Wong & Yeo Sdn Bhd who valued the said land at RM4,590,000. The defendant contends that this represents the purchase price for the said land.

[8] Accordingly, the defendant has by way of counter-claim prayed for specific performance of the option by requiring the plaintiff to enter into the sale and purchase agreement to sell the said land to the defendant at RM4,590,000. The plaintiff on its part denies that it had instructed the firm of valuers to value the said land or that RM4,590,000 is the fair and reasonable valuation thereof. Instead the plaintiff says that it has obtained a valuation report on the said land in 1997 which indicates its value to be RM7,500,000.

[9] On 6 August 2003 this case was transferred from the Sessions Court to the High Court. The plaintiff then applied to strike out the defence and counter-claim of the defendant under O. 18 r. 19(a), (b), (c) and (d) but the application was dismissed by the deputy registrar on 27 July 2004 and on the plaintiff appealing to the High Court against the decision of the deputy registrar, its appeal was dismissed on 9 December 2005.

[10] In the meantime, the plaintiff, realising that the defendant has remained in occupation of the said land but not paying any rentals for its use and occupation, filed this application under O. 22A for an order that the defendant do make interim payment to it of:

(a) RM759,000 (or such sum as the court shall deem fit) by way of interim payment and on account of the defendant's liability in respect of the use and occupation of the said land from 1 August 2002 until 30 April 2005; and

(b) that the defendant do further pay to the plaintiff by way of interim payment in respect of the defendant's continued use and occupation of the said land from 1 May 2005 until final judgment (or until Rules of the High Court further order) a periodical payment of the sum of RM23,000 per month (or such other sums the court may deem fit), such sums to be payable on or before the 7th day of each month.

[11] On 7 September 2005 the learned deputy registrar granted the application of the plaintiff but instead of ordering payment of the amounts prayed for in prayers (a) and (b) of the application the deputy registrar ordered that the amount payable by way of interim payment under prayer (a) be RM379,500 and the amount payable under prayer (b) be RM11,500 per month. The reasoning of the deputy registrar was that if the court were to eventually find that the defendant had validly

exercised the option to purchase the said land, then the plaintiff would only be entitled to be paid monthly rental at 50% of RM23,000 ie, RM11,500 per month. Hence he reduced the sums claimed in prayer (a) and (b) by 50%.

[12] The defendant being unhappy with the deputy registrar's decision, brings this appeal.

[13] The defendant contends that the plaintiff is not entitled to the interim payments sought because firstly, the plaintiff has failed to state in the affidavit that was filed in support of its application that, in the plaintiff's belief, even if a final judgment or order were given or made in favour of the defendant, the defendant would still be under an obligation to pay the plaintiff for the use and occupation of the said land during the pendency of this action.

[14] I do not find any merit in this ground. Useful guidance on what matters are required to be stated in an affidavit filed in support of an application for interim payment can be obtained from O. 22A itself. The relevant rule is sub-rule (3)(a) of O. 22A r. 2 which states:

> (3) An application under this rule shall be supported by an affidavit which shall:
>
> (a) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;
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> (b) exhibit any documentary evidence relied on by the plaintiff in support of the application; and
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> (c) if the plaintiff's claim is made under Part III of the Civil Law Act 1956, contain the full particulars of the person for whom and on whose behalf the action is being brought and of the nature of the claim in respect of which damages are sought to be recovered.

[15] It will be seen from a reading of the sub-rule that there is no requirement that the plaintiff must aver to those matters which the defendant has referred to. The defendant has referred me to a commentary in the *Malaysian High Court Practice 1998 Desk Edition*, Vol. 1 at p. 1002 which states that there is such a requirement but with all respect, in the absence of any mention of it in the sub-rule I cannot agree with the commentary.

[16] As far as the matters that need to be deposed to in the plaintiff's affidavit are concerned, I find that the plaintiff has complied with this requirement as the plaintiff has verified the amount of the interim payment applied for and the material facts upon which the amount is

claimed, namely, that the said land was let to the defendant upon the terms stated in the second sublease, a copy of which was produced, and that the monthly rental payable for the defendant's use and occupation of the said land was RM23,000 per month which represents the amount of the interim payment the plaintiff is applying to be paid for each of the months in the period mentioned in the application. As far as the grounds of the application are concerned, the plaintiff has averred that the defendant continues to use and occupy the said land pending the hearing of this suit but does not pay any sum in respect thereof.

[17] The second reason given by the defendant for opposing the plaintiff's application was that the plaintiff had failed, on a balance of probabilities, to satisfy the requirements set out in sub-rule 4(b) of O. 22A. I do not agree. A reading of sub-rule 4(b) shows that before the court exercises its discretion to order interim payment under the sub-rule, it must be satisfied of the following matters:

(i) that the plaintiff's action includes a claim for possession of land, which it does in this instance;

(ii) if the action proceeds to trial which, in this case it is, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant. As far as this requirement is concerned, I find that it has been satisfied by the plaintiff because even if the plaintiff fails in its action and judgment is given in favour of the defendant on its counter-claim, and specific performance of the option is ordered, the defendant would still be liable to pay the plaintiff a sum of money in respect of the defendant's use and occupation of the said land. This is so because if it is eventually found by the court that the defendant had validly exercised its option on 3 October 2001, then the plaintiff would have to sell the said land to the defendant for at least RM4,590,000. If that be the case then it is a term of the option that was granted to the defendant that if the option is exercised, the defendant would still be obliged to pay the plaintiff monthly rentals at the reduced rate of 50% ie, RM11,500 from the date of exercise of the option till date of transfer, and this sum is payable in addition to the purchase price for the said land of at least RM4,590,000 (less 20% of all rentals paid under the second sublease);

(iii) Sub-rule 4(b) goes on to state that if the court is satisfied with the matters referred to in (i) and (ii) above, then the court may, if it thinks fit, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-

claim or counter-claim on which the defendant may be entitled to rely. As far as this aspect of the rule is concerned, it is obvious to me that if the defendant is eventually successful in its counterclaim, it would only be liable to pay rentals at 50% of RM23,000 ie, RM11,500 per month to the plaintiff. This is a factor which the court can and should take into account in determining what the amount of the interim payment should be. Since the sub-rule requires the court to take into account any counter-claim on which the defendant may rely, I find it just that the amount of the interim payment ordered should be the reduced rate of RM11,500, which in fact is the monthly amount that the learned deputy registrar ordered to be paid by way of interim payment.

[18] Apart from the grounds already mentioned, the defendant also opposed the plaintiff's application on other grounds. It was submitted on behalf of the defendant that the plaintiff had wrongfully terminated the sublease without proper notice; that the plaintiff had prematurely commenced this action; and that the plaintiff had failed to honour its bargain. I find that these complaints of the defendant are really issues that must await determination at the main trial, which is a matter I am not concerned with at the moment. Accordingly, the matters complained of are not directly relevant to this application. However, there was one other submission which was made on behalf of the defendant which I need to address. It was said that the plaintiff should not be allowed to take advantage of its own breach; and that the plaintiff stands to benefit from its own breach by delaying and reneging on its promise to sell the said land to the defendant. According to the defendant, if the plaintiff had not reneged on its promise the purchase price would have been paid long ago with the result that the defendant would not need to pay monthly rentals for the said land. I do not agree. In the first place, the defendant's submission is based on the assumption that it had validly exercised the option to purchase, but this is a seriously disputed fact. Until the court finds that the option was validly exercised, it would be wrong to say that the plaintiff stands to benefit from its own breach. In the second place, it lies ill in the mouth of the defendant to complain that the plaintiff stands to benefit from its own breach when in actual fact it is the defendant who has 'benefited' from the dispute thus far because it is the defendant who has enjoyed the use and occupation of the said land without paying the plaintiff a cent by way of rental from as long ago as April 2002, and even of the reduced amount payable after the alleged exercise of the option by it even though its obligation to do so is clearly spelt out in the option. In the third place, the plaintiff has not delayed as alleged. After filing this suit it did try to obtain summary judgment against the defendant but was unsuccessful and hence has to proceed to a trial of this action.

[19] It was also submitted by the defendant that it would not be just for the court to order it to pay the plaintiff the monthly interim payments as applied for since only 20% of that amount would be used towards payment of the purchase price of the said land. I do not agree. Order 22A r. 9 empowers the court to make such adjustments with respect to the interim payment as may be just at the conclusion of the trial. There is nothing to prevent the defendant from requesting the court to direct, at the end of the trial, that the whole of the interim payment (instead of the 20%) be used to offset the purchase price of the said land.

[20] It was pointed out by the Court of Appeal in *David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 1 CLJ 589 CA that the underlying purpose of O. 22A is to provide for an interim payment to alleviate a plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial. To my mind I would certainly regard what the plaintiff has had to experience and will continue to experience during the period from the commencement of this action until the conclusion of the trial, as a hardship. Here, the defendant continues to use and occupy the said land from which it carries on a business but refuses to pay any rental or amount towards its use, occupation and enjoyment of the said land. The plaintiff certainly deserves to have its hardship alleviated during the pendency of this case. For all the reasons given above I am satisfied that the plaintiff has satisfied all the requirements of O. 22A rr. 2 and 4 and that it has made out a case for interim relief during the pendency of this case. I accordingly affirm the decision of the learned deputy registrar and dismiss the defendant's appeal with costs.